
23. Gender and hate crime protections

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In 2018, the Law Commission for England and Wales indicated that a public consultation would be held on whether or not to extend current ‘hate crime’ laws to include, among other things, gender. Hate crime is the colloquial term for a range of criminal offences involving harassment, victimisation or violence which are motivated by a perpetrator’s hostility towards the victim’s actual or presumed identity. This hostility must be against one of the five currently recognised ‘protected characteristics’: racial identity, religious affiliation, sexual orientation, disability and gender identity.¹ If the hostility is based on *gender* alone then this is not currently recognised as grounds for hate crime protection in England and Wales.

For many women, gender can be – and has been – an important factor in their experience of hate crime, particularly when this intersects with a recognised protected characteristic in a way which heightens their vulnerability to victimisation. Homophobic abuse directed at a lesbian necessarily involves hostility towards both her sexual orientation *and* gender. Islamophobia towards a Muslim woman who wears the hijab or niqab is marked out for religious hostility by clothing determined by her gender.² The substantial global body of work focusing specifically on gender-based violence (GBV), particularly that which pertains to violence against women and girls (VAWG), has highlighted women’s vulnerability to violent victimisation seemingly on the basis of gender alone. For this reason, some scholars and activists have called for gender to be included as a recognised protected characteristic and legislated for accordingly in line with existing hate crimes. Others have opposed this, citing that VAWG is a significant and heterogeneous area in its own right, so should remain set apart in law and policy in order to recognise the particular vulnerabilities facing women as a result of individual and structural patriarchal oppression.³ In light of this, more recent debates have suggested that it is *misogyny*, not gender, which should be considered for inclusion.

This chapter explores issues around gender, misogyny and hate crime protections in England and Wales. It begins by considering gender as a basis for hostility, concentrating specifically on the VAWG scholarship to unpack what is known about gendered hatred and targeted victimisation. It then addresses the hate crimes scholarship to ascertain how demar-

¹ ‘Gender identity’ refers to people who incur hostility because of their actual or presumed *gendervariant* identity, therefore people who identify as transgender or anyone who does not identify with their assigned sex/gender at birth. Sex is commonly used to refer to the biological demarcation of a person as male or female, while gender is understood to be the social construction of qualities defined as masculine or feminine, which may be more or less present in people who identify as either male or female. For a more informed discussion about the relevance and impact of these concepts, see A Oakley (1991/2016) *Sex, Gender and Society*, London: Routledge.

² I Zempi (2016) “‘It’s a part of me, I feel naked without it’: Choice, Agency and Identity for Muslim Women Who Wear the Niqab”, *Ethnic and Racial Studies*, 39(10): 1738–54.

³ For a comprehensive overview of this debate, see A Gill and H Mason-Bish (2013) ‘Addressing Violence Against Women as a Form of Hate Crime: Limitations and Possibilities’, *Feminist Review* 105: 1–20.

cated offences are recognised and responded to in law, as well as debates around the strengths and limitations of such categorisation. Finally, the chapter brings these discussions together to assess the potential of addressing gender-based hostility within a hate crimes framework, illustrating how this already happens in cases where victimisation is intersectional in nature. The chapter concludes by suggesting that efforts need to go further than merely expanding legislation and criminalisation processes if gender-based or misogynistic victimisation is to be effectively reduced and redressed.

1. GENDER AS A BASIS FOR HOSTILITY

Sex and gender are understood as separate, but related, concepts. A person's sex is predominantly determined at birth through biological markers (usually chromosomal and genital) which indicate whether they are male or female. Gender, on the other hand, is a set of socially constructed qualities which differentiate between masculinity and femininity, indicating the traits, behaviours and expectations affiliated to (and expected from) people demarcated as 'male' or 'female'.⁴ Traditional conceptualisations of male and female/masculinity and femininity are increasingly less rigid due to significant cultural developments,⁵ as well as sociolegal ones.⁶ While some have sought to deconstruct gender identities and roles, others have highlighted how women's experiences of harm from men are inherently gendered, with each perspective being used to reinforce arguments for recognising either *gender* or *misogyny* as a protected characteristic.

In many societies the term 'gender' has become synonymous with 'women' or issues relating to women. Gender chapters in academic textbooks often focus on how the issue affects women specifically: the 'Gender and Crime' chapters in criminology texts ordinarily depict issues relating to women as offenders and victims.⁷ What is overlooked is how the remainder of the textbook is also gendered male; but as crime is a predominantly male occupation, the 'maleness' of criminal enterprise is less evidently acknowledged.⁸ Gendered discourses also obscure male victims of sexual and domestic abuse, rendering these areas subject to much less academic inquiry than their female counterparts. Gender is clearly relevant here: much of what has been researched about victimisation has been by women (often feminist) researchers; male

⁴ In many respects, contemporary UK society has moved beyond this gender binary to recognise people who identify as transgender, agender, genderqueer, gender nonconforming and so forth. Official mechanisms, such as the gender recognition certificate, now exist to allow a person to amend their legally recorded gender.

⁵ The increase in language used to denote a wider range of gender identities, or abstention from such identification, coupled with movements to remove the need to register gender on formal documents are indicative of such cultural developments around gender.

⁶ For example, women in the UK now have citizenship rights in relation to marriage, divorce and employment which allow for greater independence and financial autonomy, where before there would have been reliance on a male provider or guardian.

⁷ This is also the case for chapters on 'race and ethnicity' which will often focus on black and minority ethnic groups.

⁸ See M Wykes and K Welsh (2009) *Violence, Gender and Justice*, London: London; also, M Wykes and A Ellis (2013) 'Bringing the Boys Back Home: Re-Engendering Criminology', in: M Cowburn, M Duggan, A Robinson and P Senior (eds), *Values in Criminology and Community Justice*, Bristol: Policy Press, 77–92.

researchers prefer researching about men's offending, but even then, only *some* men's offending is deemed worthy of investigation. The male agent remains invisible unless, as Wykes and Welsh suggest, 'they can be labelled outside the dominant ideal of heterosexual, paternal masculinity as paedophiles, mad, evil or beasts'.⁹ Ensuring who specifically is being referred to when 'gender' is being addressed is therefore important to guarantee that assumptions are not being made or the nuance of experience is not obscured.

Exploring 'gender-based violence' (GBV) research – which may appear to be inclusive of all genders – illustrates that quite often this is specifically focused on the victimisation of women and girls by male perpetrators. This is important as, although *globally* the majority of victims of crime are male, their victimisation is usually at the hands of other men and is often in the pursuit of a broader criminal aim, so a gendered rationale is less evident.¹⁰ In other words, men's violence towards other men is not usually because they are *men*, but because of something else linked to the violent enterprise. Women, on the other hand, constitute fewer victims of violence overall, but a disproportionately higher number of *domestic and sexual violence* victims. Women are predominantly harmed by men, and often men they know, which indicates a gendered dynamic to the victimisation.¹¹ Therefore, while violent victimisation is an issue for both men and women, GBV and VAWG are necessarily gendered areas of sociolegal research, practice and policy because of the nature, frequency, rationale and (as will be discussed later in this chapter) supposed justifiability of some men's violence towards women.¹² This will also be the focus of the remainder of this chapter.

Tackling the problem of men's violence against women and girls has been at the forefront of Western feminist social and political campaigning for decades. The United Nations defined VAWG in the Convention on the Elimination of All Forms of Discrimination Against Women as 'violence directed at a woman because she is a woman or acts of violence which are suffered disproportionately by women'.¹³ Examples include domestic violence, rape and sexual violence, sexual harassment, child sexual abuse, female genital mutilation, forced marriage, crimes in the name of 'honour',¹⁴ trafficking and sexual exploitation. Women are at risk of violence from male family members, colleagues and other acquaintances, but most from usually men with whom they are (or were) intimate. The World Health Organisation estimates that 35 per cent of women worldwide will experience physical and/or sexual violence at some point in their lives,¹⁵ while the United Nations indicates that up to 70 per cent of women globally have experienced physical and/or sexual violence from an intimate partner specifically.¹⁶ Patriarchy

⁹ M Wykes and M Welsh (2009) *Violence, Gender and Justice*, London: SAGE, at 3.

¹⁰ If there is a sexual orientation element to the crime, then this may not be the case.

¹¹ For example, sexual exploitation, dowry-related violence, female infanticide: see A Gill (2014) *'Honour' Killing and Violence: Theory, Policy, Practice*, London: Palgrave Macmillan.

¹² See A Howe (2009) *Sex, Violence and Crime: Foucault and the 'Man' Question*. London: Routledge.

¹³ www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm.

¹⁴ The word 'honour' is often written in quotation marks to denote the contentious nature of implying that targeted victimisation against a person is done on an honourable basis. See A Gill (2014) *'Honour' Killing and Violence: Theory, Policy, Practice*, London: Palgrave Macmillan.

¹⁵ World Health Organization, Department of Reproductive Health and Research, London School of Hygiene and Tropical Medicine, South African Medical Research Council (2013) *Global and Regional Estimates of Violence against Women: Prevalence and Health Effects of Intimate Partner Violence and Non-Partner Sexual Violence*, at 2.

¹⁶ UN Women, Global Database on Violence against Women.

is evident in much of this violence, particularly when it is fatal; most domestic murders of women are by their male partner. Often, the reasons given are indicative of male entitlement: threats to his 'honour' through her supposed insubordination, promiscuity or infidelity; her rejecting him; her requesting a separation, and so forth.¹⁷ Family relations can make it difficult for victims to escape abuse, particularly if there is an expectation that women will remain in a relationship or face wider family condemnation. The Forced Marriage Unit provides direct support to hundreds of victims in the UK and overseas annually, while the United Nations estimate that 5,000 women a year are victims of family-perpetrated 'honour' killings globally.¹⁸

2. FEMINIST PERSPECTIVES ON GENDER HOSTILITY

Feminist literature has analysed the power of violence as a tool of social control with regard to women's bodies and behaviours, highlighting women's disproportionate vulnerability to sexual and domestic abuse globally.¹⁹ Key theorists such as Catharine MacKinnon have highlighted how 'women are sexually assaulted because they are women; not individually or at random, but on the basis of sex, because of their membership in a group defined by gender'.²⁰ Viewing violence against women in terms of isolated cases belies the wider patriarchal structures in place which empower abusers and seek to silence, repress or blame victims. Therefore, the promotion of a discourse which names this highly gendered dynamic has become evident; this section will explore how it feeds into discussions of recognising misogyny rather than gender in hate crime protections.

Diana Russell has suggested engaging the concept of *femicide* (as opposed to homicide) in men's fatal violence towards women, as 'naming an injustice, and thereby providing a means of thinking about it, usually precedes the creation of a movement against it'.²¹ Similarly, Carole Sheffield advocated that violence against women can be construed as a form of *sexual terrorism* which is 'manifested through actual and implied violence; and all females irrespective of race, class, physical or mental abilities, and sexual orientation, are potential victims – at any age, at any time, or in any place'.²² Echoing Susan Brownmiller's claims that rape is used by all men to keep all women in a state of fear all the time, Sheffield goes on to outline some of the activities which constitute sexual terrorism; these range from the harassment, abuse and rape of women of all ages through to prostitution, pornography and murder. These acts serve to keep women subordinated and regulated within a patriarchal framework of male entitlement over women, reiterating the need for a specific discourse of misogyny which focuses on violence against women and girls as opposed to a more generic gender rhetoric.

¹⁷ R Dobash, R Dobash and K Cavanagh (2009) "'Out of the Blue: Men who Murder an Intimate Woman Partner', *Feminist Criminology*, 4(3): 194–225.

¹⁸ www.un.org/en/women/endviolence/pdf/VAW.pdf.

¹⁹ S Brownmiller (1975) *Against Our Will: Men, Women and Rape*, New York: Penguin.

²⁰ C MacKinnon (1991) 'Reflections on Sex Equality under Law', *Yale Law Journal*, 100(5): 1281–1328, at 1301.

²¹ J Radford and D Russell (1992) *Femicide: The Politics of Woman Killing*, Woodbridge: Twayne Publishers Inc, at xiv.

²² C Sheffield (1987) 'Sexual Terrorism and the Social Control of Women' in B.B. Hess and M.M. Ferree (eds) *Analysing Gender: A Handbook of Social Science Research*, Thousand Oaks: Sage.

These gendered experiences are argued to be illustrative of how *all* women have been constructed as potential victims of *some* men's violence. Such arguments are routinely critiqued for constituting women as previous, present or potential targets who must just accept that male victimisation is an inevitable fact of life. Similar sentiments are evident in violence prevention messages, which often target women ('Don't be a victim') rather than men ('Don't victimise'). Constituting male victimisation of women as inevitable and responsibilising individual women for their own safety indicates that the focus on *deflection* is considered more achievable than actual *prevention*. These sentiments have informed several UK government-endorsed policies and campaigns which advertise, advise and warn about the dangers of sexual violence by visibly targeting women, suggesting that they can lessen their chances of sexual victimisation by altering their behaviours, dress, company, levels of intoxication or chosen spatial patterns.²³ Women may take such messages on board (subconsciously or otherwise), modifying their behaviours and/or appearance to deflect male attention and potential harm.²⁴ Guarding against violence through moderating one's alcohol or illicit drug consumption, not being alone at night or in less populated spaces, or avoiding being considered 'overfriendly' are evidently gendered behaviours which explicitly target women; comparable safeguarding messages do not exist for men.²⁵ Maggie Wykes and Kirsty Welsh have demonstrated that traditional approaches to gender-based violence against women which focus on the victim's femininity – or lack thereof – but not the perpetrator's masculinity indicate a tacit acceptance that men will be (sexually) violent towards women.²⁶

Criticisms of these women-focused messages have exposed a range of gendered stereotypes linked to expected safety measures, deflected culpability and victim responsibilisation.²⁷ Such sentiments ensure that the obligation for gendered crime prevention is directed towards women to lessen their chances of victimisation by reinforcing and naturalising the notion that women must manage, negotiate and resist men's inevitable violence towards them.²⁸ These messages are also inherently focused on women's vulnerability to 'stranger danger' rather than harm from an intimate partner. As DeKeseredy et al. noted, rape prevention literature functions to instil fears that restrict women's social orientation while keeping them reliant upon men who are more likely to harm them.²⁹ This is problematic in that it does not seek to reduce harm, but – again – advises how to avoid, lessen or survive it, implying that this form of gendered victimisation is an inevitable part of life for women. An enhanced sociolegal focus

²³ N Beder and K Nordmeyer (2015) "Never go out alone": An Analysis of College Rape Prevention Tips', *Sexuality & Culture* 19(3): 533–43. See also: BBC News, 'Victim blaming: Is it a woman's responsibility to stay safe?' 10 October 2018, www.bbc.co.uk/news/uk-england-45809169.

²⁴ L Bates (2016) 'Why should women have to pay the price for "safety" on a daily basis?' *The Guardian*, 25 November, www.theguardian.com/lifeandstyle/womens-blog/2016/nov/25/why-should-women-have-to-pay-the-price-for-safety-on-a-daily-basis.

²⁵ O Brookes (2011) "It's more like, guys stop doing it!" Young women's adoption and rejection of safety advice when socialising in bars, pubs and clubs', *British Journal of Criminology* 51(4): 635–51.

²⁶ M Wykes and M Welsh (2009) *Violence, Gender and Justice*, London: SAGE.

²⁷ E Stanko (1996) 'Warnings to Women: Police Advice and Women's Safety in Britain', *Violence Against Women*, 2(1): 5–24.

²⁸ S Walklate (1997), 'Risk and Criminal Victimisation: A Modernist Dilemma?' *British Journal of Criminology*, 37(1): 35–45.

²⁹ W DeKeseredy, H Burshtyn and C Gordon (1992) 'Taking Woman Abuse Seriously: A Critical Response to the Solicitor General of Canada's Crime Prevention Advice', *International Review of Victimology*, 2: 157–67.

on *misogyny* would therefore highlight the gendered specificity of these messages and the wider patriarchal ideologies informing them.

Deflection techniques are also evident with regard to culpability, with perpetrators (and society) shifting the responsibility for harm onto (female) victims. The findings from one study illustrated this clearly: research participants were presented with a series of sexually disparaging statements taken from popular men's lifestyle magazines and excerpts from defendants' testimonies during rape trials which depicted women as promiscuous and readily available to be sexually conquered, degraded and controlled.³⁰ The findings indicated that not only did they find it difficult to correctly identify the statement's origin, but a significant proportion of men *agreed* with the sentiments expressed; many only changed their minds when they discovered that they were agreeing with convicted rapists. This study indicated that not only are traditional rape prevention messages targeting the wrong gender – they may be redundant altogether if men do not recognise rape apologism, or indeed actual rape.

Gendered (victim) culpability is also evident within the British criminal justice system. Many women who report victimisation have found themselves subject to suspicion regarding the veracity of their claims, with some facing accusations of falsifying reports, being somehow responsible for what happened or even having precipitated the harm.³¹ The gendered nature of the law has been evident in cases where men charged with the murder of their female partner have pleaded provocation, usually on the grounds of alleged infidelity, as justification for their excessively violent actions.³² Women, conversely, are often held to a much higher legal standard when they kill their male partners, most usually following a period of sustained domestic violence. Elsewhere, women's safety negotiations when faced with dangerous situations are often rescripted within social and criminal justice discourses as evidence of presumed consent or compliance. Failure to verbally or physically resist or try to escape is recast as an indication of agreement rather than a survival technique.³³ This fails to recognise that women may be unwilling or unable to prevent unwanted physical harm or sexual activity if they fear an escalation in violence should they not comply with their attacker's demands.³⁴ Women are all too aware of the common 'raped and murdered' media narrative present in the reporting of many fatal attacks, yet they are *still* expected to take appropriate action to prevent or resist male assailants, even if it may result in further harm.

³⁰ M Horvath, P Hegarty, S Tyler and S Mansfield (2012) "'Lights on at the end of the party': Are Lads' Mags Mainstreaming Dangerous Sexism?' *British Journal of Psychology*, 103(4): 454–71.

³¹ L Ellison and V Munro (2013) 'Better the Devil You Know? "Real Rape" Stereotypes and the Relevance of a Previous Relationship in (Mock) Juror Deliberations', *The International Journal of Evidence & Proof*, 17(4): 299–322; M Greeson, R Campbell and G Fehler-Cabral (2016) "'Nobody deserves this': Adolescent Sexual Assault Victims' Perceptions of Disbelief and Victim Blame from Police', *Journal of Community Psychology*, 44: 90–110.

³² M Burton (2001) 'Intimate Homicide and the Provocation Defence – Endangering Women? *R v. Smith*', *Feminist Legal Studies*, 9: 247–58; D Tyson (2012) *Sex, Culpability and the Defence of Provocation*, London: Routledge-Cavendish.

³³ S Taylor, L Klein, B Lewis, T Gruenewald, R Gurung and J Updegraff (2000) 'Biobehavioral responses to stress in females: Tend-and-befriend, not fight-or-flight', *Psychological Review*, 107(3): 411–29.

³⁴ J Monckton-Smith (2010) *Relating Rape and Murder: Narratives on Sex, Death and Gender*, London: Palgrave Macmillan.

3. THE LEGAL PERIMETERS OF ‘HATE CRIMES’

Discourses around ‘hate crime’ developed from the 1980s onwards and are largely limited to areas in the global north, although the acts and behaviours referred to have a much more established place in international history. Notable atrocities such as slavery and mass genocide were no doubt informed by individual and societal hostilities towards particular groups and aided by significantly imbalanced power dynamics between oppressors and the oppressed. However, the concept of *hate crime* that has emerged socially and politically in Western countries is one that speaks to more contemporary forms of victimisation. Hostility is understood as beginning on a much smaller scale (that is, among individuals or groups) and analyses focus on both the individual act and, increasingly, the wider sociopolitical context in which these acts take place.³⁵

No specific or singular hate crime legislation exists in England and Wales. Instead, various laws have been implemented since the Public Order Act 1986, which prohibited the stirring up of hatred on grounds of race, religion and sexual orientation. The racist murder of black teenager Stephen Lawrence in 1993 and subsequent failings by the police investigating his death prompted significant criticism about legal protections, leading to the Crime and Disorder Act 1998. This recognised racial hostility in demarcated offences considered to be ‘racially aggravated crimes’, incurring harsher punishments than their nonaggravated (‘basic’) counterparts. The Anti-Terrorism, Crime and Security Act 2001 amended the 1998 Act to include religious hostility as an aggravating factor. Sections 145 and 146 of the Criminal Justice Act 2003 introduced the option for enhanced sentences for offences motivated by hostility towards a person’s racial identity, religious affiliation, sexual orientation, disability or gender identity. As either crimes are *aggravated* by hostility or sentences are *enhanced* due to hostility, a two-tier system is in operation.³⁶

A differentiation is also made between hate incidents (any incident perceived to be motivated by prejudice or hate) and hate crimes (incidents which constitute a criminal offence). This broad definition is designed to capture a range of behaviours, especially those which may escalate if not addressed, meaning that for the purposes of reporting, hate crimes are subjectively determined by the victim or any other person. Whether or not they are prosecuted as such depends on the weight of the available evidence.³⁷ Some advocates of hate crime protections have commended this victim-focused approach, as the broad operational definition allows for a greater volume of harms to be reported to the police and the potential hostility motivator duly investigated. As a result, the recognition of hate crimes in the global north has led to a greater level of data capture in many countries, and a higher level of related knowledge about targeted victimisation and identity-based prejudice. On the other hand, some hate crime sceptics suggest that the subjective element is unusual, not replicated elsewhere in criminal law, and risks creating a hierarchy of harm, offences or victims which may in turn shape the criminal justice system’s response.

³⁵ N Chakraborti and J Garland (2015) *Hate Crime: Impact, Causes & Responses*, London: SAGE Publications.

³⁶ Note that the legislation refers to hostility, not hate.

³⁷ N Hall (2013) *Hate Crime*, London: Routledge.

4. HATE CRIME LEGISLATION AS SYMBOLIC

Hate crime legislation is considered symbolically significant for many reasons, including indicating vulnerability and a person's heightened exposure to possible victimisation, and offering legal protection for historically subjugated identities. Evidence has suggested that hate crimes cause more hurt to victims (and their wider communities) than similar crimes that have not been motivated by identity hostility.³⁸ This has been used as a basis to justify the differing legal responses to crimes motivated by hostility, but confusion remains over what *exactly* constitutes a hate crime and whether hostility towards *other* identity categories may constitute grounds for classifying victimisation as a hate crime.³⁹ In England and Wales, the College of Policing has indicated that the five recognised strands 'are the minimum categories that police officers and staff are expected to record',⁴⁰ while a 2013 Home Office report similarly stated: 'Crimes based on hostility to age, gender, or appearance, for example, can also be hate crimes, although they are not part of the five centrally monitored strands.'⁴¹

A true commitment to combating hate crime or identity-based victimisation could address prejudice on the basis of the offender's expression of hostility towards *any* given factor (for example, political ideology or occupation).⁴² Several judges have used their discretion to deviate from the proscribed characteristics to indicate that an offence was motivated by hatred of a person's identity characteristic. For example, the judge presiding over the Sophie Lancaster murder case described the attack as a hate crime (in this case, against the goth sub-culture) during his summing up of the trial.⁴³ Schweppe describes such decisions as evidence of a necessary 'depoliticizing' of the hate crimes from identities to facts: 'juries (or triers of fact) [should] determine whether, on the basis of the evidence before them, a hate crime was committed, rather than curtailing the operation of the legislation to a limited number of (albeit fully deserving) victim groups.'⁴⁴

Analyses of hate crimes therefore foreground the perpetrator's prejudice in a unique way. This may be considered progressive as it situates the fault with the offender, but regressive unless the wider sociocultural context of such prejudice is also examined. As Barbara Perry notes, analyses of hate crimes tend to focus more on the individual act or actor and look away from the contextual framework in which they have acted.⁴⁵ Drawing on this perspective, Betsy

³⁸ B Perry and S Alvi (2012) "'We are all vulnerable': The in terrorem effects of hate crimes', *International Review of Victimology*, 18(1): 57–71.

³⁹ M Duggan (2013) 'Working with Victims: Values and Validations' in M. Cowburn, M. Duggan, A. Robinson and P. Senior (eds) *The Values of Criminology and Community Justice*, Bristol: The Policy Press.

⁴⁰ College of Policing (2014) *Hate Crime Operational Guidance*, <http://library.college.police.uk/docs/college-of-policing/Hate-Crime-Operational-Guidance.pdf> at 7.

⁴¹ Home Office (2013) *An Overview of Hate Crime in England and Wales*, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/266358/hate-crime-2013.pdf at 11.

⁴² N Chakraborti and J Garland (2012) 'Reconceptualizing Hate Crime Victimization through the Lens of Vulnerability and "Difference"', *Theoretical Criminology*, 16(4): 499–514.

⁴³ J Garland (2010) 'Victimization of Goths and the Boundaries of Hate Crime', in N. Chakraborti (ed) *Hate Crime: Concepts, Policy, Future Directions*, London: Willan.

⁴⁴ J Schweppe (2012) 'Defining Characteristics and Politicising Victims: A Legal Perspective', *Journal of Hate Studies*, 10(1): 173–98 at 182–3.

⁴⁵ B Perry (2001) *In the Name of Hate: Understanding Hate Crimes*, London: Routledge.

Stanko suggests that the term 'hate crime' is therefore disingenuous in that it fails to recognise the wider sociocultural backdrop against which acts of identity-based victimisation occur: 'using the terminology of 'hate crime' obscures the way in which violence, its resources reinforced with institutional discourses about violence, and the manner in which different people confront and challenge everyday forms of intimidation, are distorted by faulty logic.'⁴⁶

Hate crimes are 'message crimes' in that they symbolise the negative sentiment held by the perpetrator against the victim's identity and/or wider community. These acts do not exist in a vacuum; therefore, examining individual and societal discourse is necessary to understand how and why some forms of violence and hostility are considered justifiable by those who act on their prejudices.

5. VIEWING VIOLENCE AGAINST WOMEN THROUGH A HATE CRIME FRAMEWORK

In 1999, Ben Bowling indicated that in order to explain hate crime, the analysis needed to move away from the characteristics of victims and on to the characteristics of offenders.⁴⁷ Within this, an exploration of the nature of the victim–perpetrator relationship as well as the social processes directing the perpetrator's hostility to that victim's group would facilitate new knowledge where previous assumptions had reigned. Similar sentiments were expressed by Stanko, who noted that the founding premise of hate crime is that the prejudice is rooted in the abusive individual, which is directed at the identity characteristic being displayed by the selected victim.⁴⁸ Looking at gender-based victimisation from a hate crime perspective may allow for a more nuanced understanding of what drives a perpetrator to victimise. In terms of gender, it brings masculinity into focus. Discussing the 'maleness' of hate crime, Tomsen writes about the 'masculinity turn' – the ways in which male identities are created and reproduced through criminal enterprise – in order to outline the marginalised forms of masculinity which tend to predominate in hate crime scenarios.⁴⁹ Exploring protest masculinities (such as young, urban, working class) and the victimisation of socially subordinated masculinities (such as effeminate gay men), Tomsen suggests that the 'deviant positioning of male homosexuality in the practices and discourses that reproduce social understandings of masculinity' form a backdrop for understanding violent displays by groups of heterosexual young men.⁵⁰ In other words, young men are simultaneously defining and displaying their masculinity

⁴⁶ E Stanko (2001) 'Re-Conceptualising the Policing of Hatred: Confessions and Worrying Dilemmas of a Consultant', *Law and Critique*, 12(3): 309–29, at 328.

⁴⁷ B Bowling (1999) *Violent Racism: Victimization, Policing, and Social Context*, Oxford: Oxford University Press.

⁴⁸ E Stanko (2001) 'Re-Conceptualising the Policing of Hatred: Confessions and Worrying Dilemmas of a Consultant', *Law and Critique*, 12(3): 309–29.

⁴⁹ S Tomsen (2001) 'Hate Crimes and Masculinity: New Crimes, New Responses and Some Familiar Patterns', *The 4rd National Outlook Symposium on Crime in Australia: New Crimes or New Responses*, <http://aic.gov.au/en/events/aic%20upcoming%20events/2001/~media/conferences/outlook4/tomsen.ashx/>.

⁵⁰ S Tomsen (2001) 'Hate Crimes and Masculinity: New Crimes, New Responses and Some Familiar Patterns', *The 4rd National Outlook Symposium on Crime in Australia: New Crimes or New Responses*, <http://aic.gov.au/en/events/aic%20upcoming%20events/2001/~media/conferences/outlook4/tomsen.ashx/> at 7.

within the perimeters of heteronormativity. Barbara Perry also suggests that theorising hate crime as a method by which perpetrators simultaneously position themselves as different from and dominant over victims illustrates the wider context of oppression informing the power relations between the two groups.⁵¹ Similarly, then, men who display power in abusive relationships or through violent acts towards women could be seen as ‘doing gender’ in that they are performing socially structured notions of masculinity. However, care needs to be taken that this individual pathology does not overlook wider social and cultural attitudes and behaviours which inform and sustain (and often condone) such prejudice.

A hate crime framework therefore foregrounds the perpetrator’s hostilities and related motivations for acts of targeted victimisation; all culpability is theirs. Applying this framework of analysis to gender-based victimisation, particularly violence against women and girls, offers new ways of exploring how men’s hostility towards women can be addressed differently in law. This is important in light of ongoing discussions about how to better recognise and respond to gender-based victimisation using hate crime laws. But these discussions are not new: almost two decades ago Jacobs and Potter, though sceptical of hate crime categorisations, suggested that ‘crimes against women would seem to be the most obvious candidate for recognition as hate crime’.⁵² They highlighted the case of Marc Lepin , who, on 6 December 1989, entered an engineering class at the University of Montreal in Canada, separated the male and female students, declared his hatred of feminists, then opened fire on the women in the room with a semiautomatic rifle before rampaging through the university for a further 30 minutes. Lepin  killed 14 young women before eventually turning the gun on himself. His suicide note revealed that he blamed his failings on women, most of whom he perceived to be feminists.

The 2009/10 and 2010/11 incarnations of the Crime Survey for England and Wales (CSEW) listed ‘gender’ as one of the options for discerning on what basis a person has been a victim of a hate crime.⁵³ Despite this not being a recognised hate crime strand, a significant proportion of people indicated that they had suffered such victimisation. Since then, debates around recognising gender hostility in hate crime legislation have accelerated. In 2016, Nottinghamshire police force began recording misogynistic hate crime; several other forces followed suit, deciding whether to address gender or misogyny accordingly. This distinction is important as the majority of gender-based incidents involve the targeting of *women* – either a specific woman, or women more generally. Examples of this range from online campaigns against women in the public eye (such as the case of Caroline Criado Perez⁵⁴) through to women in public spaces being subjected to sexual or vulgar verbal harassment from strangers. More often than not there is a threatening element to this abuse: men who shout sexually suggestive commands or propositions to a lone (often young) woman draw attention to her, humiliate and disempower her and make it difficult for her to retaliate, as this may incite further aggression.

⁵¹ B Perry (2001) *In the Name of Hate: Understanding Hate Crimes*. London: Routledge.

⁵² J Jacobs and K Potter (1998) *Hate Crimes: Criminal Law & Identity Politics*, Oxford: Oxford University Press, at 19.

⁵³ The CSEW was known as the British Crime Survey between 1981 and 2014, but was changed to reflect the fact that only respondents – and information – relating to England and Wales was sought and represented.

⁵⁴ Caroline Criado-Perez was subjected to a torrent of online abuse after campaigning for Jane Austen to be featured on a banknote. See: ‘Two jailed for Twitter abuse of feminist campaigner’, *The Guardian*, 24 January 2014, www.theguardian.com/uk-news/2014/jan/24/two-jailed-twitter-abuse-feminist-campaigner.

The decision taken by some forces to focus on *misogyny* (and therefore women as targets) rather than gender may be indicative of the growing awareness of women's disproportionate vulnerability to harm from men.⁵⁵

Currently, the extent to which women can avail themselves of hate crime laws to address targeted victimisation depends on whether they possess *another* recognised identity characteristic towards which hostility was directed. Valerie Jenness highlights how gender has been routinely overlooked in hate crimes against women even though the victim was specifically targeted because of her gender as well as her other identity characteristics.⁵⁶ She outlines the case of Darrell David Rice, who professed a hatred for lesbians and had actively intimidated and assaulted several women before killing Julianne Marie Williams and Laura Winans, two women he came across in Shenandoah National Park in the US. He bound and gagged them before slitting their throats. Rice stated that he had intentionally selected *women* to assault 'because they are more vulnerable than men', that he 'hates gays,' and that the victims in this case 'deserved to die because they were lesbian whores'.⁵⁷

The links between homophobia and misogyny are well documented in queer academic perspectives on antigay and antilesbian violence. Steven Tomsen and Gail Mason suggest that feminist theory's traditional focus on gender at the expense of sexuality has overlooked some core issues regarding the victimisation of women, and of lesbian women in particular.⁵⁸ Feminism has been invaluable for recognising and challenging inequality and violence against women, but this has been done largely by, and for, heterosexual women. Tomsen and Mason suggest that much can be learnt from studies on victimisation of gay men and transgender people, as this often demonstrates how attackers are displaying prejudices against *feminisation* as inferred by the victim's gender and/or sexual deviation. These prejudices are often reminiscent of condemnatory legal and social discourses where persecutory rhetoric has a historical basis that seeks to elicit culpability from the victim's actions, identity or behaviour. However, due to the way in which 'communities' are understood and constructed, women as a gender category do not constitute a 'group', as they lack a discernible community identity. Intimate partner violence – domestic abuse being a particular case in point – poses specific problems as individual women are seen as being in danger from individual men; these men are not seen as a risk to 'women', just to *that particular woman*.

6. THE COMPLEXITIES OF INCLUSION

The usefulness of criminalising individual prejudices in a structurally unequal society has been queried by those working in the VAWG arena. Hannah Mason-Bish indicated how gender was omitted from hate crime policy in Scotland due to strong opposition to its inclusion from

⁵⁵ E Stanko (2001) 'Re-Conceptualising the Policing of Hatred: Confessions and Worrying Dilemmas of a Consultant', *Law and Critique*, 12(3): 309–29, at 309.

⁵⁶ V Jenness (2003) 'Engendering Hate Crime Policy: Gender, the "Dilemma of Difference," and the Creation of Legal Subjects', *Journal of Hate Studies*, 2: 73–97.

⁵⁷ *Ibid*, at 74.

⁵⁸ S Tomsen and G Mason (2001) 'Engendering Homophobia: Violence, Sexuality and Gender Conformity', *Journal of Sociology*, 37(3): 257–73.

the Scottish Executive's Violence against Women Unit.⁵⁹ The Unit had suggested that such a perspective was reductive as a domestic abuse perpetrator usually focuses their abuse on particular women and may not necessarily be motivated by the victim's gender. Mason-Bish also indicated that policy makers were reluctant to include gender as it was seen as mostly *private* victimisation by intimate partner and therefore different to other forms of hate crime, which are often seen to be public and involving strangers. Research by Paul Iganski has demonstrated that most hate crime victimisation occurs within the remit of an ordinary person's everyday activities – as opposed to being perpetrated by members of organisations characterised by their particular prejudice – which indicates that in many cases the perpetrators of hate crimes and violence against women may be the same people.⁶⁰ How these perpetrators are treated, however, will depend on whether they have committed a 'hate crime' or 'violence against women'.

The language of hate crime has been targeted by those who are critical of the concept, warning against the danger of becoming too familiar with what 'hate crime' may or may not include. Stanko illustrates that a label as seemingly evident as 'domestic violence' can obscure the complexities, realities and experiences of this type of victimisation for those affected by it, despite its being a form of victimisation which cuts across cultures and genders.⁶¹ It is on this basis that she suggests 'targeted violence' as a more useful way of understanding, responding to and preventing men's violence against women, as 'targeted violence' necessarily questions the reasons *why* that victim was targeted and, in doing so, highlights the perpetrator's prejudices. From there, it is possible to investigate these prejudices within their wider sociocultural or sociopolitical context.

Contrastingly, theorists such as Judith Butler would discourage viewing gender as a category of hate crime, mainly on the basis that this further polarises the actors involved.⁶² Butler's work advocates that men and women perform their gender according to culturally specific social stereotypes, as evidenced by parodies such as drag and crossdressing as well as by butch lesbians and camp gay men. Envisaging gender-based hate crime laws would merely exacerbate already constructed differences and reinforce binaries that privilege one demarcated group over another. Setting some people's victimisation apart by virtue of their socially defined characteristics (such as race, faith, sexual orientation) indicates the need to 'perform' these differences in order to see them as being separate and therefore vulnerable to persecution.

The positionality and conceptualisation of the victim is a key in differentiating between hate crime and gender-based violence frameworks of analysis. Following a hate crime, victims are rarely (if ever) asked to account for what they may have done to incite the offence, as to do so would detract from the fact that the perpetrator, not the victim, was to blame. Contrastingly, (female) victims of sexual assaults are routinely asked about what they were wearing, whether they had been drinking, if they were under the influence of controlled substances, why they were walking alone late at night or had taken a route considered to be unsafe, or are made to

⁵⁹ H Mason-Bish (2010) 'Future Challenges for Hate Crime Policy', in N. Chakraborti (ed) *Hate Crime: Concepts, Causes, Controversies*, London: Willan, at 70.

⁶⁰ P Iganski (2008) *'Hate Crime' and the City*, Bristol: Policy Press.

⁶¹ E Stanko (2001) 'Re-Conceptualising the Policing of Hatred: Confessions and Worrying Dilemmas of a Consultant', *Law and Critique*, 12(3): 309–29.

⁶² J Butler (1993) *Bodies that Matter*, London: Routledge.

account for any behaviour which implies culpability in their victimisation.⁶³ Similarly, the reporting process involved with hate crime prioritises the *victim's* perception of why they were targeted: many women who are considered at an increased level of vulnerability or risk of harm find that this is often used *against* them when they are chastised for not safeguarding themselves more effectively.⁶⁴ Some gender-specific crimes committed by men against women are not evidently rooted in prejudice, hate or any specific emotion, but rather purely because of the power afforded to the perpetrator to act, possibly with impunity. These crimes, in which *women* are disproportionately harmed by men, destabilise the 'hate' dynamic of hate crimes. Nonetheless, the hate crime framework of analysis indicates that the female victim does not precipitate her victimisation; rather, the blame and accountability lies with the perpetrator. This is fundamentally applicable to the power differentials being displayed in acts of men's violence against women.

7. CONCLUSION

Current hate crime laws are useful for indicating trends and patterns of experience, but may prove ineffectual to prevent harm. Like most legislation, laws pertaining to hate crime are *reactive*; these laws do not necessarily *prevent* crime. Categorising gender or misogyny as recognised grounds for hate crime may prove symbolic in that it will vastly increase, or even skew, hate crime statistics, as women are already experiencing the types of victimisation that such laws would seek to recognise.

⁶³ M van der Bruggen and A Grubb (2014) 'A Review of the Literature relating to Rape Victim Blaming: An Analysis of the Impact of Observer and Victim Characteristics on Attribution of Blame in Rape Cases', *Aggression and Violent Behavior*, 19(5): 523–31.

⁶⁴ For example, sex workers or younger women in care are often more vulnerable to experiencing harm, yet are held more responsible if and when this happens.